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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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09/605,001

06/27/2000

Gary Karlin Michelson

101.0044-04000

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EXAMINER

BROWN, MICHAEL A

ART UNIT

PAPER NUMBER

3772

MAIL DATE

DELIVERY MODE

05/01/2007

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

ED

Office Action Summary	Application No. 09/605,001	Applicant(s) MICHELSON, GARY KARLIN	
	Examiner Michael Brown	Art Unit 3772	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 02 February 2007.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 105-132 is/are pending in the application.
- 4a) Of the above claim(s) 130-132 is/are withdrawn from consideration.
- 5) ☒ Claim(s) 108-119, 121-124 and 127-129 is/are allowed.
- 6) ☒ Claim(s) 105-107, 120, 125-126 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 105-107 and 120 are rejected under 35 U.S.C. 102(b) as being anticipated by Morrison '505.

Morrison '505 discloses in figures 1-5 a method for performing a surgical procedure comprising the steps of providing a surgical retractor including an elongated hollow member B, defining a longitudinal axis (fig. 1), the elongated member including proximal and distal end portions (fig. 1) and an opening (the opening between arms 11, fig. 2), the distal portion is configured for at least partially inserting at least partially into an intervertebral space (fig. 2) and has two space apart retractor arms 11, each arm including first and second supporting surfaces laterally displaced with respect to the longitudinal axis (fig. 2), distracting the adjacent vertebrae by at least partially inserting the retractor arms into the vertebral space (col. 2, lines 1-9), the supporting surface of one retractor arm engages one vertebrae (fig. 2), and the other support surface of the other retractor arm engages the other vertebrae (fig. 2), the adjacent opposed vertebrae are laterally displaced (fig. 2) performing a surgical procedure (inserting the graft C), introducing a surgical instrument 15 within the opening in the surgical retractor, the

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surgical instrument being used to perform the surgical procedure (inserting the graft C) and introducing a fusion implant C through the opening in the surgical retractor (fig. 2).

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 125-126 are rejected under 35 U.S.C. 102(b) as being anticipated by Moskovich.

Moskivich discloses in figure 4 a method for performing a surgical procedure comprising providing a surgical retractor including an elongated hollow member (11, 12 and 13 make up the retractor), having proximal and distal end portions (fig. 4), the distal portion having first and second stationary retractor arms (11, 12 are stationary) configured for insertion at least partially into an intervertebral space defined between to opposed vertebrae (3, 4), distracting the adjacent vertebrae to a predetermined distraction position by at least partially inserting the retractor arms within the intervertebral space (to remove a damaged disc, col. 1, lines 20-24) performing the surgical procedure (inserting a bone graft 5) between the adjacent vertebrae and the retractor arms include first and second opposed supporting surfaces (fig. 4) that are inserted between the upper and lower vertebrae during the distraction step.

Allowable Subject Matter

Claims 108-119, 121-124 and 127-129 are allowed.

Response to Arguments

Applicant's arguments filed February 2, 2007 have been fully considered but they are not persuasive. Applicant argues that Morrison doesn't disclose two retractor arms, where each arm has a first surface for contacting or supporting one vertebrae and a second surface for contacting or supporting a second surface. However, Morrison does disclose two retractor arms 11 wherein each arm has a first surface for contacting the surface of one vertebrae and a second surface for contacting the surface of another vertebrae. The contact surfaces are at the end of 11. Applicant argues that Moskovich doesn't disclose a method for performing a surgical procedure using a surgical retractor or a surgical retractor having an elongated hollow member. However, Moskovich discloses a method for performing a surgical procedure using a surgical retractor (11, 12 and 13). The surgical retractor includes an elongated hollow member (that is made up by 11, 12).

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of

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the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Michael Brown whose telephone number is 571-272-4972. The examiner can normally be reached on 5:30 am-4:00 pm Monday-Thursday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Patricia Bianco can be reached on 571-272-4940. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

M. Brown
April 27, 2007

A handwritten signature in black ink, appearing to read "Michael A. Brown", with a long horizontal flourish extending to the right.

MICHAEL A. BROWN
PRIMARY EXAMINER